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Supreme Court of the United States

OCTOBER TERM, 1948

No. 429

SAM ZIMMERMAN,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Court of Appeals of Maryland has not yet been reported officially. It may be found, however, in 59 A. (2d) 675, at pages 194-206 of the Transcript of Record, and at pages 67-75 of the printed Record.[1]

[1] The term "Transcript of Record" and the symbol "Tr." refer to the complete typewritten Transcript of Record as certified to this Court by the Court of Appeals of Maryland. The term "record" and the Symbol "R" cover the printed portions of the Record as filed by Petitioner and Respondent in the Court of Appeals of Maryland, and the Opinion of that Court, and submitted herewith to each of the Justices of this Court.

JURISDICTION

The judgment of the Court of Appeals of Maryland to be reviewed in this case was entered on June 16, 1948. The Petition for a Writ of Certiorari was filed in this Court on September 13, 1948. This Petition was granted on November 22, 1948, and the case was placed on the summary docket as Case No. 429. The jurisdiction of this Court was and is invoked under the provisions of Section 1257 of the Act of September 1, 1948 (Section 1257) of the Judicial Code; 28 U. S. C. A., Sec. 1257.

STATEMENT OF THE CASE

On September 5, 1946, an indictment was filed against Sam Zimmerman, a Negro (hereinafter referred to as the Petitioner) in the Criminal Court of Baltimore City which charged the Petitioner with murder. Thereafter, the Petitioner was arraigned and pleaded not guilty.

On December 18, 1946, the Petitioner requested permission from the trial court to withdraw his plea of not guilty and moved to quash the indictment. The grounds alleged in the motion to quash were (1) that the Grand Jury which returned the indictment against the Petitioner "was not selected in accordance with the requirements of the Charter and Public Local Laws of Baltimore City and particularly Sections 687 to 709, inclusive", and (2) that the indictment returned against the Petitioner conflicted with the provisions of the 5th, 6th and 14th Amendments to the Federal Constitution, the Constitution of the State of Maryland, and the laws of the State of Maryland.

The theory underlying Petitioner's motion to quash the indictment was that members of the Negro race "have been and are systematically and wilfully denied their fair representation on" grand juries in the City of Baltimore

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(including the Grand Jury which returned the indictment against the Petitioner); that Negroes are deliberately excluded from membership on such grand juries "on account of their race and color"; and that membership of the Negro race on such grand juries "is deliberately limited and prescribed by those persons who, under the law, are charged with the duty of proper selection thereof, to one negro member out of a total membership of twenty-three, and only to one negro member, no more and no less."[2]

On January 29, 1947, the Criminal Court of Baltimore City struck out the plea of not guilty which had theretofore been entered by the Petitioner. Thereafter, testimony was taken in open court on the Petitioner's motion to quash the indictment. On March 27, 1947, the Criminal Court of Baltimore City overruled the motion to quash.

On April 21, 1947, the Petitioner was found guilty of murder in the first degree, and, on December 5, 1947, the Petitioner was sentenced to life imprisonment in the Maryland State Penitentiary.

On December 15, 1947, the Petitioner entered an appeal to the Court of Appeals of Maryland. Thereafter, following a complete and full hearing, the Court of Appeals on June 16, 1948, affirmed the disposition of the case which had theretofore been made by the Criminal Court of Baltimore City.

The facts upon which the Petitioner bases his allegations of unconstitutional discrimination against Negroes in this case revolve around the method by which grand juries are selected in the City of Baltimore, Maryland. The selection of such juries in the City of Baltimore is made before each term of the Criminal Court by the unanimous

[2] See the Motion of Sam Zimmerman to quash the indictment returned against him (Tr. 7-8).

vote of the members of the Supreme Bench of Baltimore City.[3]

The Supreme Bench of Baltimore City is the collective name for the eleven nisi prius judges who compose the Eighth Judicial Circuit of the State of Maryland.[4] Each judge (or member of the Supreme Bench of Baltimore City) is an elected official of the State of Maryland, whose term runs for fifteen years.[5] Upon qualifying for office, each member of the Supreme Bench of Baltimore City is required to take an oath to the effect that he will, among other things, support the Constitution of the United States.[6] Members of the Supreme Bench rotate each year from the law courts to the equity courts and thence to the criminal courts. The jurisdiction of each of the judges of the Supreme Bench of Baltimore City is both original and intermediate appellate, with all appeals from their decisions being taken directly to the Court of Appeals of Maryland. Next to the members of the Court of Appeals themselves, the members of the Supreme Bench of Baltimore City are the highest judicial officers of the State of Maryland.[7]

As stated above, selection of the grand juries for the City of Baltimore is made by the members of the Supreme Bench of Baltimore City. This selection may be made from two sources, i.e. (1) from a list of seven hundred and fifty (750) names drawn from the jury service file which is prepared in the office of the jury clerk, and (2) from a secondary list of grand jury nominations made by

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[3] There are three terms of the Criminal Court of Baltimore City each year, i.e. the January, May and September Terms.

[4] Constitution of Maryland, Article IV, Section 19.

[5] Constitution of Maryland, Article IV, Section 3.

[6] Constitution of Maryland, Article I, Section 6.

[7] This position is, of course, shared by the judges of the various circuits which are composed of the Counties of the State of Maryland.

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the individual members of the Supreme Bench of Baltimore City.

The first step in selecting grand juries in Baltimore City is the preparation of the jury service file. This file consists of the names of sixteen thousand (16,000) persons, more or less, who are residents of the City. In preparing the jury service file, the jury clerk makes a list of prospective jurors by taking names from tax lists, voting lists, the criss-cross telephone book, the automobile book and the city directory (R. 56). Persons thus selected are sent "pink slips" through the mails which fix a time and place for the holding of an examination before the jury judge for the purpose of determining the qualifications of such persons as jurors. If such qualifications are found to exist, special cards are made out for the candidates in question which contain all pertinent information relative to the prospective jurors (R. 57). The candidates then become members of the jury service file.

Prior to the commencement of each term of criminal court, the jury clerk is required to forward to the Supreme Bench of Baltimore City a list of seven hundred and fifty (750) persons from the jury service file (R. 45). This list usually contains the names of fifty (50) Negroes. The selection of the grand jury is then made by the Supreme Bench of Baltimore City from that list of names "which is augmented by a list of suggestions made by the various judges" (R. 15, 16).

The list of suggestions made by the various judges referred to above begins with a list of persons known by or recommended to the individual members of the Supreme Bench of Baltimore City, such persons being deemed by the judges as qualified for grand jury service. Every judge may make suggestions of anywhere from two to

fifteen names, the result being a composite list which varies from forty-two (42) to sixty-two (62) names (R. 62). The number of Negroes on this composite list may vary from four (4) to eight (8) persons (R. 62). These Negroes are selected by different members of the Supreme Bench of Baltimore City (R. 54).

Each judge, after assembling his grand jury nominations, forwards the list to the Chief Judge who, in turn, sends the list to the jury clerk. The jury clerk checks each name on the list for the purpose of determining the age, occupation, residence, race, prior jury service and all other relative information concerning the grand jury candidates (in many cases this information is obtained from the jury service file). After he has collected all of the above described information, the jury clerk tabulates his findings opposite the names of each grand jury candidate on a new list which is prepared in his office.

The list of grand jury nominations made by the judges, together with the list of seven hundred and fifty (750) names prepared from the jury service file, is turned over by the jury clerk to the clerk of the Supreme Bench of Baltimore City. Upon the receipt of those two lists, the clerk of the Supreme Bench of Baltimore City inserts all of the names in the "Supreme Bench of Baltimore City Jury Book". At the same time the clerk draws a certification to be signed by the judges which will indicate the names of persons qualified to serve as grand and petit jurors. Thereafter, the "Supreme Bench of Baltimore City Jury Book", together with the certification, are taken to the judges' consultation room.

After the "Supreme Bench of Baltimore City Jury Book" and the list of judges' nominations for grand jury service are deposited in the Supreme Bench of Baltimore City

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consultation room, the grand jury is selected by the unanimous action of all of the judges. In selecting the grand jury there is no stereotyped course of procedure within the consultation room, the meeting being open to a "free and frank discussion among the Judges as to the qualifications of persons to serve on the Grand Jury" (R. 55). When the judges have agreed on 23 names, the clerk of the Supreme Bench of Baltimore City is called to the consultation room and given a list of those names, signed by the judges, which list ultimately constitutes the grand jury. The clerk retypes the list, and sends copies thereof to the Sheriff's office and to the jury clerk's office.

In some cases, a grand jury is unable to organize because one or more persons theretofore selected to serve have been excused. It then becomes necessary to hold a special meeting of the Supreme Bench of Baltimore City to fill the vacancies so occasioned. In such instances, prospective jurors, including Negroes, have been telephoned for the purpose of determining whether they are available for jury service (R. 54).

In 1942 the method by which grand and petit juries were selected in the City of Baltimore was challenged in the United States District Court for the District of Maryland, *United States ex rel Jackson v. Brady*, 47 Fed. Supp. 362 (D. Md. 1942). The contention in that case was that Negroes had been systematically, arbitrarily or intentionally excluded from both grand and petit jury service. The District Court did not rule specifically on the method by which grand juries had been selected, but did find that the petit juries had not been selected in violation of the mandates of the equal protection clause of the Fourteenth Amendment to the Federal Constitution. In 1943 this decision was affirmed on appeal, *United States ex rel Jackson*

v. Brady, 133 F. (2d) 476 (C. C. A. 4th, 1943), and certiorari was denied by this Court, 319 U. S. 746 (1943).

Late in 1944, the judges of the Supreme Bench of Baltimore City took several steps to improve the method of selecting grand and petit juries for the City of Baltimore. One important step taken by the Bench was the inauguration of a Thursday luncheon meeting which is attended by all of the judges. At these meetings the selection and composition of grand and petit juries is discussed, the participation of Negroes in jury service being one of the topics (R. 46). In addition, the present judges of the Supreme Bench of Baltimore City since 1944 have done the following things in regard to jury selection and service (R. 47):

1. Ordered the removal of distinguishing marks after the names of colored jurors.

2. Approved the bill to repeal the exemption of honorary members of the Maryland Militia from jury service.

3. Recommended an increase in the pay of jurors and transfer of control over the rate of pay of jurors to the Board of Estimates of Baltimore City.

4. Appointed a committee of judges to study the jury system, and to make recommendations looking to:

(a) Broadening the representative character of the basic jury list, and

(b) Improvement in the method of selecting persons for jury service.

Up to and including the May Term, 1946 Grand Jury nine Negroes have been picked to serve on the five grand juries in Baltimore City drawn since the inauguration of the improved method of selecting such juries as outlined above. Of this number, two have been excused from jury

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service, while seven Negroes have actually served (R. 47). (For figures since May 1946 to date, see footnote 15, *infra*.)

The Petitioner was indicted by the May Term, 1946 Grand Jury. Chief Judge Smith was the jury judge during 1946 (R. 51).

The May Term, 1946 Grand Jury was selected by the unanimous vote of all the members of the Supreme Bench from (1) a list of seven hundred and fifty names supplied to the Bench by the jury clerk, and (2) the nominations of the individual judges for grand jury service. The list of seven hundred and fifty names contained the names of approximately fifty Negroes. Prior to 1944, each list of seven hundred and fifty names customarily contained the names of approximately twenty-five Negroes. Since 1944, this list has contained the names of approximately fifty Negroes (R. 22). The nominations made by the individual judges of the Supreme Bench of Baltimore City for jury service in the selection of the May Term, 1946 Grand Jury contained the names of six Negroes (R. 52).

Of the twenty-three men originally selected to serve on the Grand Jury for the May Term, 1946, two were Negroes. Both of these men voluntarily asked to be excused, and were excused from jury service. Thereafter a special meeting of the Supreme Bench of Baltimore City was held for the purpose of filling the vacancies caused by the fact that the two Negroes originally selected to serve on the Grand Jury (and one white man) had been excused. The three substitutions, which were "not made specifically one person for another" (R. 65) contained the name of one colored man.

It thus appears that of the twenty-six men selected to serve on the Grand Jury for the May Term, 1946, three were Negroes.

SUMMARY OF ARGUMENT

This case raises the question of whether the nisi prius judges who collectively compose the Supreme Bench of Baltimore City discriminated against Negroes in the selection of the May Term, 1946 Grand Jury of the City of Baltimore—a Grand Jury which returned an indictment against the Petitioner for murder.

Only one Negro served on the May Term, 1946 Grand Jury. It is our position, however, that this fact, standing alone, does not constitute constitutional grounds for quashing the indictment found and returned against the Petitioner. We further contend that every fact contained in the record in this case, which bears directly upon the actual selection of the very Grand Jury involved in this proceeding, proves conclusively that that Grand Jury was fairly, honestly and constitutionally selected.

In an attempt to overcome the patent absence of actual racial discrimnation in the selection of the May Term, 1946 Grand Jury, the Petitioner relies upon the fact that from 1910 through 1944, each grand jury selected in the City of Baltimore contained but one Negro member. The record in this case clearly shows, however, that the unbroken series of "one Negro" grand juries in Baltimore City ended with the year 1944, and has never been resumed. We submit that the rationale of the decision of this Court in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945), makes the set pattern of grand juries in Baltimore City prior to 1944 not probative—either directly or indirectly—of the question whether the May Term, 1946 Grand Jury was the product of racial discrimination.

The Petitioner has asserted that the decision of the lower court should be reversed because the Criminal Court of

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Baltimore City refused to hear evidence of four retired members of the Supreme Bench of Baltimore City which related to the method by which grand juries were selected prior to 1944. A complete proffer of all of the testimony to be offered by these judges was made by counsel for Petitioner in the trial court, and the Court of Appeals of Maryland, in reaching its decision, considered that testimony as admitted into evidence. Since the Court of Appeals gave the Petitioner every possible benefit to be gained from this evidence, we submit that the rulings made by the trial court were non-prejudicial to the Petitioner and, as a result, the decision of the lower court should be affirmed.

The Petitioner has maintained that the provisions of the Charter and Public Local Laws of Baltimore City constitute one of the factors permitting and contributing to the discrimination against Negroes in the selection of grand juries. It is our position that this contention, when reduced to its lowest terms, amounts only to the point that the statutes in question offered an opportunity for discrimination against Negroes, and that that fact, without more, does not constitute constitutional grounds for quashing an indictment found against a Negro.

ARGUMENT

I.

THE MERE FACT THAT THE GRAND JURY WHICH INDICTED PETITIONER (THE MAY TERM, 1946 GRAND JURY OF BALTIMORE CITY) CONTAINED BUT ONE NEGRO MEMBER, DOES NOT CONSTITUTE GROUNDS FOR QUASHING THE INDICTMENT RETURNED AGAINST PETITIONER.

As ultimately constituted, the May Term, 1946 Grand Jury of the City of Baltimore contained but one Negro member (although two others who were originally selected requested to be, and were excused). At the outset of our

argument, therefore, we stress the principle that this fact, standing alone, does not present constitutional grounds for quashing the indictment returned against the Petitioner.[8] The Federal Constitution does not require that Negroes should be members of all grand juries which indict Negroes, the constitutional prohibition being only against the willful and intentional *discrimination* against Negroes in the selection of grand juries solely because of their race or color.[9]

Four years after the passage of 8 U. S. C. A. Sec. 44, this Court decided the leading cases of *Strauder v. West Virginia*, 100 U. S. 303, 25 L. Ed. 664 (1879), and *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1879). In each of these cases, it was clearly established that the presence of one Negro on a grand jury—and only one—or the presence of no Negroes on a grand jury would not, standing alone, constitute constitutional grounds for quash-

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[8] In his motion to quash the indictment, the Petitioner contended that he had been deprived of his rights under the Fifth, Sixth and Fourteenth Amendments to the Federal Constitution. It is elementary, however, that nothing contained in the Fifth or Sixth Amendments applies to the case at bar since those Amendments have specific reference to Federal and not State action. In the great majority of cases dealing with discriminatory practices in the selection of grand juries, this Court has based its decisions on the equal protection clause of the Fourteenth Amendment. There is some authority, however, for the proposition that the due process clause of the Fourteenth Amendment is also applicable. 24 Am. Jur. *Grand Juries*, Sec. 27.

[9] The seriousness of this case is magnified by the shadow of 8 U.S.C.A., Sec. 44, 18 Stats. 336. This Act, which has been a guardian of civil rights for more than seventy-three years, provides that any person charged with the duty of selecting jurors who shall exclude or fail to summons any citizen on account of race, color or previous condition of servitude "shall on conviction thereof be deemed guilty of a misdemeanor, and be fined not more than $5,000". No question can now remain but that this Act is fully authorized by the Federal Constitution and that it is applicable to a nisi prius judge charged with the duty of selecting a grand jury. *Ex Parte Virginia*, 100 U. S. 339, 25 L. Ed. 676 (1880).

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ing the indictment found against a Negro. For example, in the *Strauder* case, *supra*, this Court reached the conclusion that a State statute which limited jury service to "all white male persons" denied equal protection under the laws to Negroes as required by the Fourteenth Amendment to the Constitution. In reaching this result, this Court put the question for decision as follows, at page 305:

> "It is to be observed that the first of these questions is not whether a colored man, where an indictment has been preferred against him, has a right to a grand or a petit jury composed in whole or in part of persons of his own race or color; but it is whether, in the composition or selection of jurors by whom he is to be indicted or tried, all persons of his race or color may be excluded by law, solely because of their race or color, so that by no possibility can any colored man sit upon the jury."

Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667 (1879), expanded the doctrine established by the *Strauder* case, *supra*, by holding that not only a State statute but also action by any State official which excluded Negroes from jury service would contravene the dictates of the Fourteenth Amendment. This Court pointed out, however, that a Negro would not necessarily be deprived of his civil rights by reason of the fact that no members of his race had been appointed to the grand jury which found the indictment against him. In this connection, this Court said at page 322:

> "It *is* a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State Court, viz.: a right to have the jury composed in part of colored men. *A mixed jury in a par-*

> *ticular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any federal statute.* It is not, therefore, guaranteed by the 14th Amendment, or within the purview of section 641." (Italics supplied.)

No case decided by this Court since its decision in the *Rives* case, *supra*, has established the rule that the absence —or limitation—of Negroes from grand jury duty is of itself evidence of unconstitutional discrimination. Thus, in *Neal v. Delaware*, 103 U. S. 370, 26 L. Ed. 567 (1881), this Court restated the general rule, as follows, at page 394:

> "We repeat what was said in that case, that while *a colored citizen, party to a trial involving his life, liberty, or property, cannot claim, as matter of right, that his race shall have a representation on the jury, and while a mixed jury in a particular case, is not within the meaning of the Constitution, always or absolutely necessary to the equal protection of the laws,* it *is* a right to which he is entitled, 'That in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race and no discrimination against them, because of their color'." (Italics supplied.)

Three years later, this Court enunciated somewhat the same rule in *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354 (1882). In that case, this Court observed at page 117:

> "There was no legal right in the accused, to a jury composed in part of his own race. All that he could rightfully demand was a jury from which his race was not excluded *because of their color.*"

Many later cases decided by this Court have dealt with the problem now under consideration. *Tarrance v. Florida*, 188 U. S. 519, 47 L. Ed. 572 (1903); *Rogers v. Alabama*, 192 U. S. 226, 48 L. Ed. 417 (1903); *Carter v. Texas*, 177 U. S.

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442, 44 L. Ed. 839 (1900); *Hollins v. Oklahoma*, 295 U. S. 394, 79 L. Ed. 1500 (1935); *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935); *Hale v. Kentucky*, 303 U. S. 613, 82 L. Ed. 1050 (1938). But in not one of these cases has this Court even implied that proof of the absence of all Negroes from one particular jury panel—or the limitation of Negroes from one particular jury panel—*without more*, was sufficient to require the indictment found and returned against a Negro to be quashed.[10]

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[10] A recent case on this subject, *Pierre v. Louisiana*, 306 U. S. 354, 83 L. Ed. 757 (1939), illustrates the point that absence of Negroes from a particular grand jury is significant and decisive only if a continuous history of unbroken exclusion from juries has led up to that particular jury involved. In other words, discrimination is shown not by the absence from the jury involved of all Negroes, but by the fact that every jury in that jurisdiction for many years has lacked Negroes. In the *Pierre* case, it was proved that no Negroes had ever served on the grand or petit juries for the Parish in which the defendant had been indicted; that during this period only one Negro had been called for jury service; that a jury list of three hundred persons selected in December 1936 (the year in which the defendant was indicted) contained the names of only three Negroes (one of whom was dead); that of the total Parish population, 49.3% were Negroes. The facts further reveal that to qualify for jury service in Louisiana a person was required to be (1) a citizen of the State and a resident for at least two years in the Parish for which the jury was selected; (2) over twenty-one years of age; (3) able to read and write; (4) not charged with any offense, having no record of a felony conviction, and be of general good character and standing in the community. In ordering the indictment found against the defendant to be quashed, this Court said at pages 361-362:

> "The testimony introduced by petitioner on his motion to quash created a strong *prima facie* showing that negroes had been systematically excluded—because of race—from the Grand Jury and the venire from which it was selected. Such an exclusion is a denial of equal protection of the laws, contrary to the Federal Constitution—the supreme law of the land. 'The fact that the testimony * * * was not challenged by evidence appropriately direct, cannot be brushed aside.' Had there been evidence obtainable to contradict and disprove the testimony offered by petitioner, it cannot be assumed that the State would have refrained from introducing it."

That the mere absence of Negroes on a single grand jury or the mere limitation of Negroes on a single grand jury does not, standing alone, constitute grounds for quashing the indictment founded against a Negro has been reiterated by this Court in the recent case of *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945) and in the very recent decision of *Moore v. New York*, 333 U. S. 565, 92 L. Ed. 637 (1948).

In the *Akins* case, *supra*, the defendant, a Negro, was indicted, tried, found guilty of and sentenced for murder by the Criminal District Court of Dallas County, Texas. In his motion to quash the indictment found against him, the defendant alleged and proved that prior to June 1, 1942, no colored man had ever served on the grand jury in Dallas County. The facts also revealed that one Negro was placed on the grand jury list in October, 1942, but did not serve and that one Negro was placed on the grand jury list in 1943 who did serve. Before this Court, the defendant took the position that the equal protection clause guaranteed to him not only the right to have Negroes considered as prospective veniremen, but also the right to have them considered without numerical or proportional limitation. The majority of this Court rejected this premise and stated, as follows, at page 404:

> "Our directions that indictments be quashed when Negroes, although numerous in the community, were excluded from grand jury lists have been based on the theory that their continual exclusion indicated discrimination and not on the theory that racial groups must be recognized. Norris v. Alabama, 294 U. S. 587, 79 L. ed. 1074, 55 S. Ct. 579; Hill v. Texas, 316 U. S. 400, 86 L. ed. 1559, 62 S. Ct. 1159, and Smith v. Texas, 311 U. S. 128, 85 L. ed. 84, 61 S. Ct. 164, all supra. *The mere fact of inequality in the number selected does not in itself show discrimination. A purpose to discriminate must be present which may be proven by systematic*

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exclusion of eligible jurymen of the proscribed race or by unequal application of the law to such an extent as to show intentional discrimination." (Italics supplied.)

The state of the law on this point is well summed up in an annotation to *Hale v. Kentucky, supra,* found in 82 L. Ed. at page 1061, wherein it is said:

> "The decisions of the United States Supreme Court holding a defendant entitled to indictment or trial by a jury from which members of his class or race have not been intentionally excluded appear to have created in some quarters the impression that, in order to constitute a valid jury, there must be on it some members of the defendant's class or race. This, of course, is an entirely erroneous impression, which the appellate courts, including the United States Supreme Court, have been quick to correct.
>
> "In a number of cases the courts have expressly pointed out that a defendant in a criminal case has no constitutional right to be indicted or tried by any particular jury, or by a jury composed in part of members of his race or class."

The most recent case in which this Court has dealt with the problem here under discussion is *Moore v. New York,* 333 U. S. 565, 92 L. Ed. 637 (1948).[11] In that case, it

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[11] The only other recent case in which an opinion has been written by this Court relating to the instant problem is *Patton v. Mississippi,* 332 U. S. 463, 92 L. Ed. 164 (1947). In that case, this Court ordered an indictment found against a Negro to be quashed because the proof established an arbitrary and systematic exclusion of Negroes from jury service solely because of their race. This result was clearly justified since the defendant proved without contradiction that no Negroes had served on grand or petit juries in Lauderdale County for more than thirty years; that one Negro had been summoned for jury service during that period but had failed to appear; that two or three unidentified Negroes had been placed on the jury list during that

appeared that one hundred and fifty names were drawn from the jury panel under the supervision of a Justice of the State Supreme Court and that there were no Negroes on the jury list as drawn. This Court in sustaining the indictment against the argument that the systematic limitation of the number of Negroes on a jury panel was sufficient to vitiate the proceedings said, in part, at page 568:

> "It is admitted that on this panel of one hundred and fifty there were no Negroes. But not only is the record wanting in proof of intentional and systematic exclusion—the only witnesses sworn testified that there was no such practice or intent. Nothing in the background facts discredits this testimony. * * * The record is utterly devoid of proof of systematic, intentional and deliberate exclusion of Negroes from jury duty."

From the above outline of the pertinent decisions of this Court, we submit that the following legal principles properly govern the case at bar:

1. The fact that Negroes are absent from a grand jury panel which indicted a Negro—or the fact that the number of Negroes was limited on a grand jury panel which indicted a Negro—*without more* does not constitute grounds for quashing the indictment.

2. Before an indictment found against a Negro should be quashed because of the absence of Negroes from the grand jury panel (or the limitation of Negroes from the grand jury panel) it must be proved that Negroes were intentionally, arbitrarily and systematically discriminated against in the selection of the particular grand jury in question solely because of their race.

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period; that the total adult population in the County was thirty-four thousand, of which twelve thousand were Negroes; that several hundred Negroes were qualified to vote in the County; and that Negroes had served on Federal grand and petit juries for the District which included Lauderdale County.

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II.

THE FACTS IN THIS CASE DO NOT PROVE THAT THE SUPREME BENCH OF BALTIMORE CITY DISCRIMINATED AGAINST NEGROES IN THE SELECTION OF THE MAY TERM, 1946 GRAND JURY.

As we have pointed out, the mere fact that the May Term, 1946 Grand Jury (the Grand Jury which indicted the Petitioner) contained only one Negro member does not, of itself, constitute constitutional grounds for quashing the indictment found and returned against the Petitioner.

Therefore, does the record in the case at bar contain any other facts which prove clearly and conclusively that the Supreme Bench of Baltimore City discriminated against Negroes in the selection of the May Term 1946 Grand Jury.[12]

In his Brief, Petitioner seeks to establish racial discrimination in the selection of the May Term, 1946 Grand Jury by showing that from 1910 to 1944 each grand jury in Baltimore City had one and only one Negro member. It is of paramount significance, however, that at no point in his Brief does the Petitioner (nor can he) directly connect this historical analysis with the May Term, 1946 Grand Jury—the Grand Jury which indicted the Petitioner.[13]

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[12] That the Petitioner in the case at bar must carry the burden of proving that Negroes were discriminated against in the selection of the Grand Jury which indicted him cannot now be subject to doubt. This principle was established by this Court in *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 667 (1897). In the later case of *Carter v. Texas*, 177 U. S. 442, 44 L. Ed. 839 (1900), this Court said at page 447:

> "The motion to quash on such a ground being based on allegations of facts not appearing in the record, those allegations, if controverted by the attorney for the state, must be supported by evidence on the part of the defendant."

The same principle was reiterated in the recent decision of this Court in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945), in which this Court observed at page 400: "The burden is, of course, upon the defendant to establish the discrimination."

[13] The Petitioner's Brief is replete with general statements to the effect that from 1910 up to and including the May Term, 1946 Grand

We wish here to underline with the greatest of emphasis the point that the decision in this case turns on the issue of whether the judges of the Supreme Bench of Baltimore City actually discriminated against Negroes in the selection of the May Term, 1946 Grand Jury. In order that this pivotal question may be ascertained, we invite this Court's attention to the only facts in the record in this case which deal directly with the actual selection of the May Term, 1946 Grand Jury.

The record shows that the May Term, 1946 Grand Jury was selected from a composite list of names, including (1) a list of 750 names supplied to the Members of the Supreme Bench of Baltimore City by the jury clerk, and (2) certain nominations made by the individual judges for grand jury service. It further appears that the list of 750 names contained the names of approximately 50 Negroes, and that the nominations made by the individual judges of the Supreme Bench of Baltimore City for jury service contained the names of six Negroes.

In addition, the record in this case conclusively shows that of the 26 persons selected to serve on the May Term, 1946 Grand Jury, three were Negroes. Moreover, it appears that both of the Negroes originally selected to serve by the judges of the Supreme Bench of Baltimore for the May Term, 1946 Grand Jury requested to be excused from jury service and were excused. The voluntary action of those

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Jury only one Negro had served on each of 108 grand juries, while two Negroes had served on each of two grand juries. See, for example, Brief of Petitioner, pages 16, 21. It is obvious, however, that such general statements tell only part of the story. For example, the Grand Jury which indicted the Petitioner—the May Term, 1946 Grand Jury—contained only one Negro member, but the facts further reveal that three Negroes in all were nominated to serve. If Negroes voluntarily elect not to serve on a particular grand jury after they have been nominated for such service, the fault cannot be that of the State. For further discussion of this matter, see footnote 15, ante.

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Negro candidates for jury service required the Supreme Bench of Baltimore City to hold a special meeting for the purpose of filling vacancies. At this meeting one additional Negro was selected to serve on the Grand Jury in question.

The facts as to the number of Negroes on the basic lists from which were selected the members of the May Term, 1946 Grand Jury, and as to the number actually selected, not only negative any inference that there was a discrimination, but indeed show affirmatively that there was not. Thus, the incontrovertible facts in the case show that in the selection of this particular Grand Jury there was no violation of the letter or the spirit of the Constitution of the United States under the interpretations of this Court in matters of this kind.

In an attempt to overcome the patent clarity of the absence of actual discrimination, Petitioner recites again and again that there was but one Negro member on each Grand Jury in Baltimore City from 1910 to 1944.[14] He seeks to draw around him the mantle of the doctrine that a consistent course of procedure in drawing juries is evidence of the way in which a particular jury was selected. We do not challenge that doctrine where the facts fit and the course of conduct has been consistent down to the occasion complained of. We do challenge the validity of its application to the facts of this case. Whatever had happened in the selection of juries from 1910 to 1944 ended for good with the coming of January 1, 1945. Petitioner's effort to

[14] In making the contention above we do not deny the general principle that evidence of a course of procedure in drawing juries may be offered to show the method by which a particular jury has been selected. This rule has clearly been established by the decisions of this Court. For example, see *Norris v. Alabama*, 294 U. S. 587, 79 L. Ed. 1074 (1935); *Hale v. Kentucky*, 303 U. S. 613, 82 L. Ed. 1050 (1938); *Pierre v. Louisiana*, 306 U. S. 354, 83 L. Ed. 757 (1939).

use the "course of procedure" evidence fails because what *has* happened is probative of what *did* happen only if things are *now* as they were *then*. Petitioner not only attempts to overlook or gloss over an essential factual gap, but also attempts to explain away or ignores a basic legal concept flowing from the factual gap. The legal concept, where consistency of procedure has ended, is that adopted by this Court in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945), namely, that past practices of selecting grand juries will not be determinative of racial discrimination in the selection of a particular grand jury, if the record proves that those past practices have come to an end.

That the use of the method by which grand juries were selected in Baltimore City was changed late in 1944 by the members of the Supreme Bench is clearly sustained by (1) the record in this case, (2) the opinion of the trial court filed in this case, and (3) the opinion of the Court of Appeals of Maryland. These three sources will be discussed in the order listed here.

The record in the case at bar reveals that Chief Judge Smith, while testifying under oath, stated emphatically that while the procedural method of selecting grand juries had not changed, *"the use made by the Judges of the method has changed"*, and that *"different results have been produced"* (R. 45). In addition, Chief Judge Smith, after describing the advent of the luncheon meetings held each Thursday by all of the members of the Supreme Bench, observed that "during these meetings the selection and composition of the grand juries and petit juries and *the participation of Negroes in jury service* has been discussed" (R.46).

No evidence in the record of this case contradicts the sworn statements of the Chief Judge of the Supreme Bench

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which are outlined above. To the exact contrary, the record in this proceeding is replete with facts which are completely independent from but which support in every detail the testimony of the Chief Judge.

In this connection, we underline the following facts:

(1) On the January Term, 1945 Grand Jury two Negroes were certified as members and both served.

(2) On the September Term, 1945 Grand Jury, two Negroes were certified as members and both served.

(3) On the May Term, 1946 Grand Jury (which indicted the Petitioner), three Negroes were certified to serve; two *voluntarily* asked to be and were excused; and one Negro served.

(4) On the seven grand juries empaneled since 1945 (to the date of the hearing in the trial court) eleven Negroes were certified to serve as members and nine served.[15]

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[15] In addition to the facts set forth in the text which are included in the record in this proceeding, we respectfully direct this Court's attention to the following matters which are not specifically in the record in this case, but which are a matter of public record in the Courts of the City of Baltimore, and are, therefore, subject to judicial notice.

1. On the September Term, 1946 Grand Jury, one Negro was certified as a member, and this Negro served.
2. On the January Term, 1947 Grand Jury, one Negro was certified as a member, and that Negro served.
3. On the May Term, 1947 Grand Jury, five Negroes were certified as members, and four served.
4. On the September Term, 1947 Grand Jury, three Negroes were certified as members, and three served.
5. On the January Term, 1948 Grand Jury, three Negroes were certified as members, and three served.
6. On the May Term, 1948 Grand Jury, four Negroes were certified as members, and none served.
7. On the September Term, 1948 Grand Jury, four Negroes were certified as members, and two served.

Certainly the statistics outlined above are conclusive on the fact that the use of the method in selecting grand juries in the City of

In addition to these facts, we call this Court's particular attention to the fact that Judge E. Paul Mason signed the order certifying the May Term, 1946 Grand Jury. Before ascending to the Bench, Judge Mason had served as counsel in the case of *United States ex rel. Jackson v. Brady*, 47 Fed. Supp. 362 (D. Md., 1942). As we have already pointed out, the same argument advanced by the Petitioner here with respect to the selection of the May Term, 1946 Grand Jury was made by Judge Mason in the *Jackson* case with respect to petit juries in Baltimore City. It is inconceivable that Judge Mason would have condoned a practice in the case at bar which he so ably and skillfully condemned in the *Jackson* case.

Baltimore had been changed at the time the May Term, 1946 Grand Jury—the Grand Jury which indicted Petitioner—was drawn.

This Court will observe that no Negroes served on the May Term, 1948 Grand Jury. It is significant, we think, that this was the first Grand Jury in the City of Baltimore in the past thirty-eight years on which no Negroes served. In explanation of this fact, the following appears in the published charge of Judge Herman M. Moser to the Grand Jury, May Term, 1948, The Daily Record, Baltimore, Tuesday, May 11, 1948:

> "In the selection of this Grand Jury for the May Term, 1948, the Supreme Bench named four negroes in the list of Grand Jurors selected to serve.
>
> Grand Jurors must devote at least five mornings every week for a period of four months to their important work. In addition there are visits to penal institutions and other investigations to be made, in some instances requiring much additional time.
>
> Sometimes the Grand Jury is required to sit in the afternoons. Therefore, when it is a real hardship on the person chosen, the Court, for good cause shown, will excuse him or her.
>
> For this term of Court we have excused these persons because in each instance they were able to show the Court that service on the Grand Jury would have been extremely burdensome to them and, in many instances, would have meant the loss of their positions.
>
> This is the explanation for the fact that there are no Negroes on the Grand Jury, in spite of the fact that four were named by the Supreme Bench."

Based on this record, and as a participant in the process of selecting the grand jury in question, Judge Sherbow, in his opinion in the Criminal Court of Baltimore City, stated unqualifiedly that the Supreme Bench of Baltimore City "has sought to avoid both discrimination in the selection of Grand Jurors, and even the appearance of discrimination" (R. 7). And again, that "the Supreme Bench of Baltimore City is not discriminating against Negroes in the selection of Grand Jurors" (R. 8-9). More specifically, Judge Sherbow said, in rendering his oral opinion, that:

> "The evidence in the case dates from Judge Smith's first Grand Jury as Chief Judge, that is, since 1945. There has been no discrimination of any kind since that date. I am not dealing here with any charge that anybody may make as to Grand Juries selected prior to that time.
>
> "The evidence here shows no discrimination. The facts are clear, and, I think, demonstrate not that there was no Grand Jury in a long time that had more than one Negro, but on the contrary that in the past two years and a few months there have been three Grand Juries where two Negroes actually were named. The Supreme Bench is not responsible for the fact that the very Grand Jury that indicted Zimmerman had two persons named who were colored but who for personal reasons requested that they be excused from serving."

The entire record in this case was completely reviewed by the Court of Appeals of Maryland, a Court which has been recognized for generations as a fair, unbiased and completely impartial Court.[10] After making that review

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[10] Although the precise point in the case at bar had never been decided by the Court of Appeals of Maryland, that Court has on several occasions been faced with related questions. For example, in *Cooper v. State*, 64 Md. 40, 20 A. 986 (1885), the specific questions were: (1) whether the lower court erred in refusing the defendant's application to strike out his plea of not guilty for the purpose of imposing

and after hearing extensive argument by counsel for the Petitioner and by counsel for the Respondent, the Court of Appeals stated unqualifiedly that "if a policy of limitation was followed before 1944 it was obviously discontinued in 1945."

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a plea in abatement; (2) whether the lower court erred in refusing to permit the defendant to remove his case to the United States District Court on the theory that the laws of the State of Maryland applicable to the selection of grand and petit juries deprived the defendant (a Negro) of equal protection under the law. The Court of Appeals in rendering its decision in the *Cooper* case, *supra*, cited and relied upon decisions of this Court; principally the cases of *Virginia v. Rives*, 100 U. S. 313, 25 L. Ed. 676 (1876); and *Bush v. Kentucky*, 107 U. S. 110, 27 L. Ed. 354 (1882). In *Lee v. State*, 163 Md. 56, 161 A. 284 (1932), the question presented to the Court of Appeals of Maryland was whether a petit jury drawn in a criminal case was the product of racial discrimination. The facts showed that the jury was selected by the Judge of the Circuit Court for Baltimore County (which is not to be confused with the Criminal Court of Baltimore City, a separate and distinct tribunal); that the Judge had never selected a Negro for jury service; that the explanation for this exclusion was that the Judge did not consider Negroes at all, that he did not exclude them from consideration, but that he merely did not consider them. The Court of Appeals reviewed all of the decisions of this Court relating to racial discrimination in drawing juries and reached the conclusion that the jury in question was drawn in contravention of the Constitution and the decisions of this Court. In reversing the conviction and remanding the case for a new trial, the Court of Appeals stated at page 66:

> "But it has been strongly urged upon this court that the course of procedure followed, and the actual selections made by it throughout all the jury terms of the last twenty-six years, show an established practice or system in which no opening is left for members of the negro race to obtain places on juries, and that this amounts to exclusion in the constitutional sense. And there is no gainsaying that, in pursuing the method of noting down names of good men suggested to him in his daily routine, the judge has not taken down any but those of white men. His system of drawing jurors begins with a collection of names of white eligibles, and hence is confined from the beginning to the selection of white men. Only the white men appear to have been looked to for jurors. The evidence, with the long, unbroken absence of negroes from the juries selected, seems to show an established practice, confining selections to white men as effectually as if such a restriction were prescribed by statute. And the

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We most earnestly submit that the complete record in this case contains ample evidence to sustain the finding of the Court of Appeals of Maryland that the use of the method by which grand juries are selected in the City of Baltimore was changed in 1945. Certainly the unqualified statements made by Judge Sherbow to this effect cannot be overlooked, particularly in view of the fact that Judge Sherbow was a member of the Bench when the May Term, 1946 Grand Jury was selected, and actively participated in the selection of that Grand Jury. Moreover, the facts which we have hereinabove called to the attention of this Court, which are completely independent of the oral statements made by Chief Judge Smith and Judge Sherbow, sustain the position for which we contend. In view of the principle that the findings of the Court of Appeals of Maryland and the conclusion reached by it are entitled to great weight here, *Fay v. New York*, 332 U. S. 261, 272, 91 L. Ed. 2043 (1947); *Norris v. Alabama*, 294 U. S. 587, 590, 79 L. Ed. 1074 (1935); *Pierre v. Louisiana*, 306 U. S. 354, 358, 83

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court has concluded that this, under the authorities, amounts to unconstitutional exclusion of negroes."

The *Lee* case, *supra*, reached the Court of Appeals again. *Lee v. State*, 164 Md. 550, 165 A. 614 (1933). On this appeal, the Court of Appeals of Maryland held that the error implicit in the drawing of the first petit jury had been subsequently cured. Subsequently, this Court denied certiorari, 290 U. S. 639 (1933). The most recent decision of the Court of Appeals of Maryland dealing with the question of racial discrimination in the drawing of petit juries is *Jackson v. State*, 180 Md. 658, 26 A. (2d) 815 (1942), in which the Court of Appeals held that the record contained no evidence on the selection of the jury in question.

Based on the following synopsis of the decisions of the Court of Appeals of Maryland which have dealt with racial discrimination in the drawing of juries, we submit it to be clear that that Court has, whenever the occasion required it, struck down as invalid a jury which had been selected in contravention of the Federal Constitution or the decisions of this Court. Certainly the Court of Appeals would have struck down the conviction in the case at bar on the authority of *Lee v. State, supra*, if it had felt that the facts in the present case justified a ruling similar to that reached there.

L. Ed. 757 (1939), we submit that this Court should find as a fact that the practice of selecting grand juries which had obtained in the City of Baltimore was changed in the year 1945.[17]

Because the practice of selecting grand juries in Baltimore City had been changed by 1945, and since the record in this case completely fails to establish that Negroes were discriminated against in the selection of the May Term, 1946 Grand Jury, we submit that this case may be decided on the basic philosophy implicit in *Akins v. Texas*, 325 U. S. 398, 89 L. Ed. 1692 (1945). In the *Akins* case, as in the case at bar, a Negro, who had been indicted, tried, convicted and sentenced for the crime of murder, moved to quash the indictment found and returned against him on the grounds of racial discrimination in the selection of the grand jury. This discrimination was said to consist *of an arbitrary and purposeful limitation by the Grand Jury Commissioners of the number of Negroes to one*, who was placed upon the grand jury panel of sixteen for the term of court at which the indictment against the Petitioner was found.

In support of his motion to quash, the defendant in the *Akins*, case, *supra*, proved that prior to June 1, 1942 (the date on which this Court decided the case of *Hill v. Texas*, 316 U. S. 400, 86 L. Ed. 1559 (1942) no colored man had ever served on a grand jury in the county in which the defendant had been indicted. The facts further revealed that one Negro had been placed on the October Term 1942 Grand Jury, but had not served, and that one Negro had

[17] Counsel for the Petitioner have obviously attempted to obtain from this Court a ruling on a new principle of law, i.e. whether the mere limitation of Negroes on a grand jury will constitute racial discrimination. In view of the fact that the practice of limiting Negroes on grand juries in the City of Baltimore had ceased before the May Term, 1946 Grand Jury was drawn, we submit that it is unnecessary to decide that question in the case at bar.

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been placed on the January Term, 1943 Grand Jury who had served. One of the jury commissioners testified that he "had no intention of *placing more than one negro on the panel*". He further stated that, "When we did that we had finished with the negro." And a second jury commissioner stated that "I did not have any intention *of putting more than one negro on the list;* I could not think of anybody; ** * * our intentions were to get just one negro on the Grand Jury.*"

This Court held that the evidence in the *Akins* case, *supra,* failed to establish the fact that the jury commissioners had systematically, intentionally or arbitrarily excluded Negroes from the Grand Jury which had indicted the defendant. In reaching this result, the Court said, at pages 403-404:

> "Purposeful discrimination is not sustained by a showing that on a single grand jury the number of members of one race is less than that race's proportion of the eligible individuals. The number of our races and nationalities stands in the way of evolution of such a conception of due process or equal protection. Defendants under our criminal statutes are not entitled to demand representatives of their racial inheritance upon juries before whom they are tried. But such defendants are entitled to require that those who are trusted with jury selection shall not pursue a course of conduct which results in discrimination 'in the selection of jurors on racial grounds'."

Certainly the facts outlined in the *Akins* decision make out an eminently stronger case for racial discrimination in the selection of grand juries than do the facts in the case at bar.

In the *Akins case,* no Negroes had ever served on a grand jury for the County in which the defendant was indicted until this Court decided the matter of *Hill v.*

Texas, supra. In the case at bar at least one Negro has always been a member of every grand jury for Baltimore City.

In the *Akins* case, a change of policy in selecting Negroes for grand jury service was installed after the decision of this Court in *Hill v. Texas, supra.* In the case at bar a change in the use of the method of selecting grand juries in Baltimore City has been employed since late in 1944. In both situations, the change was intended to secure larger Negro representation on grand juries.

In the *Akins* case, it clearly appeared that the jury commissioners intentionally and purposely limited the number of Negroes to one on the grand jury which indicted the defendant. In the case at bar, the exact opposite is true, the facts showing that there was no intentional, systematic or arbitrary limitation or exclusion of Negroes from the May Term, 1946 Grand Jury by the members of the Supreme Bench of Baltimore City. To the contrary, the facts in the case at bar show that of the twenty-six persons called for grand jury service for the May Term, 1946, three were Negroes; and that on the five grand juries beginning with the January Term, 1945, and down to the May Term, 1946 Grand Jury, nine Negroes have been selected to serve.

In his Brief, the Petitioner complains that the Court of Appeals of Maryland "failed to follow a long line of applicable decisions of this Court". Although a substantial list of cases is set out in his Brief to support this contention, Petitioner draws particular attention to the matter of *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84 (1940), and to the case of *Hill v. Texas,* 316 U. S. 400, 86 L. Ed. 1559 (1942). We submit that neither of these cases controls the case at bar.

In the *Smith* case, the evidence revealed that Negroes constituted twenty percent of the population of the district in which the defendant had been indicted; that ten

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percent thereof were poll-tax payers; that from 1931 to 1938 only five of three hundred and eighty-four grand jurors who served were Negroes; that of the five hundred and twelve persons summoned for grand jury duty only eighteen were Negroes; that of these eighteen, thirteen appeared as the last names on the list and, therefore, would not, as a practical matter, be called; that of the five Negroes who did serve, the same individual had served three times, so that only three individual Negroes served at all; that of thirty-two grand juries empanelled only five had Negro members while twenty-seven had none.

In quashing the indictment this Court said at pages 130-131:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever. But by reason of the wide discretion permissible in the various steps of the plan it is equally capable of being applied in such a manner as practically to proscribe any group thought by the law's administrators to be undesirable. And from the record before us the conclusion is inescapable that it is the latter application that has prevailed in Harris County. Chance and accident alone could hardly have brought about the listing for grand jury service of so few negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service. Nor could chance and accident have been responsible for the combination of circumstances under which a negro's name, when listed at all, almost invariably appeared as number 16, and under which number 16 was never called for service unless it proved impossible to obtain the required jurors from the first 15 names on the list."

It appeared in *Hill v. Texas,* 316 U. S. 400, 86 L. Ed. 1559 (1942), that the defendant, a Negro was indicted for the crime of rape by the Grand Jury for Dallas County, Texas.

A motion to quash the indictment was filed on behalf of the defendant upon the ground "that negroes had been excluded from the Grand Jury which returned the indictment, and that the jury commissioners and other state officers charged with the duty of organizing and impanelling grand juries in Dallas County have for many years systematically excluded, and in this case did exclude, negroes from the grand jury because of their race." In support of this motion, it was proved that the jury commissioners (who assembled the grand jury in question) summoned white persons with whom they were acquainted and whom they knew were qualified; that the jury commissioners knew of no qualified Negroes who "would make a good grand juror"; that they "made no investigation or inquiry to ascertain whether there were Negroes in the county qualified for grand jury service."

The facts further revealed that a district attorney (later a judge) testified "that he never knew of a Negro being called to serve on a grand jury in the county". Qualified Negroes testified that they had lived in the County for from fifty-four to twenty-six years and that they had "never known of a Negro to be called on a grand jury." Additional statistical evidence was introduced which showed that there were sixty-six thousand poll taxpayers in the county, eight thousand of whom were Negroes; that only 7.5 percent. of the Negro population of the county were illiterate. In ordering the indictment to be quashed this Court said at page 404:

> "We think petitioner made out a prima facie case, which the State failed to meet, of racial discrimination in the selection of grand jurors which the equal protection clause forbids. As we pointed out in *Smith v. Texas, supra,* (311 U. S. 131), chance or accident could hardly have accounted for the continuous omission of negroes from the grand jury lists for so long a

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period as sixteen years or more. The jury commissioners, although the matter was discussed by them, consciously omitted to place the name of any negro on the jury list. They made no effort to ascertain whether there were within the county members of the colored race qualified to serve as jurors, and if so who they were. They thus failed to perform their constitutional duty—recognized by Section 4 of the Civil Rights Act of March 1, 1875, 8 U. S. C. A. sec. 44, and fully established since the decision in 1881 of *Neal v. Delaware*, 103 U. S. 370, *supra*—not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of jurors on racial grounds. Discrimination can arise from the action of commissioners who exclude all negroes whom they do not know to be qualified and who neither know nor seek to learn whether they are in fact any qualified to serve. In such a case, discrimination necessarily results where there are qualified negroes available for jury service."

It is obvious, we submit, that both the *Smith* case and the *Hill* case, *supra*, dealt with situations in which a pattern of systematic and intentional racial discrimination had carried into and had been responsible for the very grand jury which indicted the defendants there involved. In neither case did the State show that the unlawful pattern had changed. In both cases the unchanged pattern was one of total exclusion, unless the half-hearted attempt to comply with the mandates of this Court in the *Smith* case, *supra*, can be dignified by the term "limitation".

In conclusion, a succinct summary of, first, the fatal weaknesses of the Petitioner's case and, second, the affirmative strengths of the Respondent's case, may help in correctly appraising the fundamental, basic and determinative issue before this Court, namely—was there present in the selec-

tion of the May Term, 1946 Grand Jury of Baltimore City actual, intentional discrimination against Negroes as such.

First:

1. Burden is admittedly on the Petitioner to convince this Court that there was actual and intentional discrimination in the selection of the May Term, 1946 Grand Jury of Baltimore City.

2. The facts bearing upon the actual selection of the May Term, 1946 Grand Jury show that that Grand Jury was constitutionally drawn. For example, Chief Judge Smith testified under oath that there was no discrimination implicit in the selection of the Grand Jury in question. Moreover, Judge Sherbow, in his opinion which may be taken as evidence in this case, stated emphatically that there had been no racial discrimination in the selection of the May Term, 1946 Grand Jury. In addition, the record shows that six Negroes were on the list of nominations made by the Judges of the Supreme Bench from which the May Term, 1946 Grand Jury was selected; that of the 26 men selected for jury service, three were Negroes; that two Negroes voluntarily asked to be excused from jury service and were excused; and that one Negro and one white man were selected in substitution for the two Negroes who had been excused.

3. Petitioner has produced no evidence of intentional discrimination against Negroes in the actual selection of the May Term, 1946 Grand Jury. To the contrary, the facts in the record show clearly that the May Term, 1946 Grand Jury was honestly, conscientiously and constitutionally drawn.

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Second:

1. In an attempt to overcome the fact that there is no evidence in this case showing discrimination against Negroes in the selection of the May Term, 1946 Grand Jury, Petitioner has proved only in this connection that each of the three grand juries in Baltimore City for each year beginning with 1910 and ending in 1944, had one Negro and none had more or less.

2. Petitioner's proof stops there, as it must, on the facts. The January Term, 1945 Grand Jury of Baltimore City had two Negroes, as did the September Grand Jury of that year. The Grand Jury immediately under consideration, that of May, 1946, had on it, as originally drawn, two Negroes, both of whom asked to be excused and for whom one Negro and one white man were eventually substituted. Thus, the unbroken chain of one-Negro grand juries which ran from 1910 to 1944 stopped in January, 1945.

3. Petitioner's effort to bridge the gap between 1944 and the May Term, 1946 Grand Jury by the proffer of the testimony of the ex-judges of the Supreme Bench of Baltimore City, does not help him. None of the judges served after 1944 except Judge O'Dunne, who served only until June, 1945. As far as Judge O'Dunne's proffered testimony is concerned, the record is plain that the January, 1945 Grand Jury originally had on it two Negroes. Nothing which he might have said could change this fact. Furthermore, there is no dispute that while the method of selecting Grand Juries has never changed (using the word "method" in the sense of mechanics of selection) it is clear that the use made of that method did change, beginning in 1945, as the figures show.

Third:

1. The State has proved in this case that the use of the method for selecting Grand Juries in the City of Baltimore which obtained from 1910 to 1944 had terminated as of January 1, 1945, and was not in operation at the time the May Term, 1946 Grand Jury was selected.

2. The first affirmative fact which sustains the Respondent's contention outlined above is the fact that the composition of the eleven man Supreme Bench changed materially in 1943 and 1944. The six new judges serving at the time of the selection of the May Term, 1946 Grand Jury were Judge Tucker who was appointed on June 18, 1943; Judge Moylan on September 11, 1943; Judge Sherbow on May 4, 1944; Judge Mason on October 17, 1944; Judge Moser on October 23, 1944; and Judge Manley on October 1, 1945. Judge W. Conwell Smith became Chief Judge of the Supreme Bench on September 1, 1944. Thus, the first grand jury selected under the chief judgeship of Judge Smith, and by the newly constituted Supreme Bench, namely, the January Term, 1945 Grand Jury, was the first in many years to contain two Negroes, and began the series of grand juries on which have served from none to five Negroes.

3. The sworn testimony of Judge W. Conwell Smith is to the fact that while the method of selecting Grand Juries has remained unchanged, the use to which that method has been put has changed since the beginning of 1945.

4. The testimony of Judge Emory H. Niles of the Supreme Bench shows that in April of 1946, he selected John L. Berry, a Negro, for service on the May Term

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Grand Jury. Mr. Berry was certified, but asked to be excused. Judge Niles further testified (Tr. 155): "In 1946 I have nominated two members of the colored race and would have nominated others if their names had been available to me and I had known them."

5. Judge E. Paul Mason of the Supreme Bench was counsel for the Petitioner in the case of *United States ex rel. Jackson v. Brady, supra*, in which the question of discrimination against Negroes on petit juries was the issue. The first grand jury selected by the Supreme Bench of Baltimore City after Judge Mason became a member was the January, 1945 Grand Jury, on which, for the first time since 1910, there appeared two members of the Negro race.

6. The re-constituted Bench, under a new Chief Judge, dating from the beginning of 1945, not only increased the number of colored men on the grand juries, but also ordered the removal of distinguishing marks after the names of colored jurors on both the grand and petit juries, and appointed a committee of judges to make recommendations looking to the broadening of the representative character of the jury list and improvement in the method of selecting jurors. In this study, the participation of Negroes was considered as one phase of the problem (R. 47, 48).

7. The opinion of Judge Sherbow, who sat on this case and who became a member of the Supreme Bench in 1944, is the equivalent of sworn testimony by him as to the facts at issue here. His statement is that the jury clerk is completely free from any bias and has exercised neither conscious nor unconscious discrimination against Negroes. He further said: "The

Grand Jury of May, 1946, which indicted Zimmerman, was fairly and properly chosen in accordance with the laws. No discrimination against Negroes in the naming of that Grand Jury, nor has there been any discrimination of any kind since I have been on the Bench."

8. The Court of Appeals of Maryland found as a fact, after considering all testimony which had been rejected as if in the record, that if there had been discrimination up to 1944, it ceased as of January 1, 1945. This is a court which has not hesitated to protect the righ's of Negroes. See the cases cited in footnote 16. In one of those cases, *Lee v. State, supra,* a conviction was set aside on the ground that racial discrimination was shown by a long course of conduct. Thus, the importance and significance of the court's finding in the instant case that there was no discrimination is made more impressive.

For the reasons set forth above, we most earnestly submit that the Court of Appeals of Maryland reached the correct conclusion in the case at bar, and that its decision should be affirmed.

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III.

THE RULINGS MADE BY THE CRIMINAL COURT OF BALTIMORE CITY AT THE HEARING ON PETITIONER'S MOTION TO QUASH THE INDICTMENT DO NOT CONSTITUTE GROUNDS FOR REVERSING THE DECISION OF THE COURT OF APPEALS OF MARYLAND.

In his Brief, the Petitioner maintains that a new trial should be granted in this case because of certain rulings on matters of evidence which were made by the Criminal Court of Baltimore City at the hearing on Petitioner's motion to quash. Petitioner's chief complaint in this direction is that the testimony of four retired members of the Supreme Bench, i.e. Judge Samuel K. Dennis, Judge Eugene O'Dunne, Judge Eli Frank and Judge Duke Bond, was not admitted into the record by the trial court. After the trial court had ruled on these matters, counsel for the Petitioner was permitted to make a complete and full tender of the facts which he sought to prove through the testimony of the four Judges named above. For the convenience of this Court, the entire tender made by counsel for the Petitioner is reproduced below.[18]

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[18] The complete proffer is as follows (Tr. 135-137):

"Mr. Boyd: Your Honor, I tender to prove, based on the questions that I have already propounded and which have been denied, that from 1928 through the greater part of 1944 it was the established, definite, deliberate practice and system of the Supreme Bench of Baltimore City to limit the colored members of the Grand Jury to one, no more than one, and not less than one. I further tender to prove by Judge Dennis that it was the established, recognized, accepted, and deliberate practice of the Supreme Bench accepting as its final selection as the colored member of the Grand Jury that name suggested by the Republican member of the Supreme Bench or the senior Republican member of the Supreme Bench in those rare instances when there was more than one. I also offer to prove substantially those exact facts by former Judge Eugene O'Dunne, serving from 1926 until

It requires no citation of authority, we submit, to sustain the general proposition that a ruling on a matter of evidence will not constitute grounds for setting aside a verdict and ordering a new trial unless upon the entire record it appears that the truth has not been reached. That this rule obtains in the Federal Courts is readily apparent, both from various Acts of Congress,[19] and from the decisions of this Court.[20] We maintain, therefore, that the Petitioner must affirmatively demonstrate from the record in these proceedings as an entirety that he has been denied some substantial right and has thus been prevented from having a fair trial by reason of the rulings made by the trial court on the evidence points in question before the decision of the lower court should be reversed.

Before the Court of Appeals of Maryland, the Petitioner most strenuously urged as one of the grounds for reversal the fact that the Criminal Court of Baltimore City had

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1945, and by former Judge Eli Frank, who served from 1922 until 1943. I further offer to prove—

"Judge Frank: Until 1944.

"Mr. Boyd: Excuse me, until 1944. I further offer to prove by Judge Frank that on occasions he suggested that there be a change in the method of selecting the colored members of the Grand Jury, particularly as to the number, and that that suggestion did not meet any favorable response on the part of the other members of the Bench. I also offer to prove substantially the same facts by Judge Duke Bond, who was a member of the Supreme Bench—I don't remember when you were on.

"Judge Bond: 1922 to 1938.

"Mr. Boyd: 1922, to 1938. I further offer to prove by Judge O'Dunne that on one occasion in his membership on the Bench he more or less innocently suggested the name of a proposed colored member and whether successful or not I do not at this time know, but that he was made to understand by other members of the Bench that that was not in accord with the recognized and carried out practice."

[19] For example, see: Act of February 26, 1919, Chapter 48, 40 Stat. 1181, 28 U.S.C.A. 391.

[20] For example, see: *McCandless v. United States*, 298 U. S. 342, 80 L. Ed. 1205 (1936).

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erred in its rulings on the evidence which he sought to introduce by the four retired Judges. In opposition, counsel for the State maintained that the rulings made by the trial court on these points was non-prejudicial since the sum total of the tendered evidence utterly failed to establish the fact that the Supreme Bench of Baltimore City had discriminated against Negroes in the selection of the May Term, 1946 Grand Jury. After completely reviewing the record, the Court of Appeals of Maryland treated the evidence proffered by the Petitioner as though it had been admitted, and decided that the rulings made by the trial court were non-prejudicial and did not constitute grounds for reversal.[21] We submit that since the Court of Appeals of Maryland considered the full weight of Petitioner's tender, treated the evidence there proffered as admitted, and decided the case on the basis of that evidence, the Petitioner has been denied no substantial right by reason of the rulings in question.

This Court—like the Court of Appeals of Maryland—should, of course, consider the complete tender made by counsel for the Petitioner as part of the evidence in this

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[21] On this precise point, the Court of Appeals of Maryland said:

"For the purposes of this appeal we shall treat the evidence proffered as though it had been admitted. Mr. Folger's testimony that one, and only one, Negro served upon each Grand Jury from 1910 to 1944, would doubtless support an inference that this result was not obtained by chance, but was dictated by policy. But any inference based on a mere numerical pattern is rebutted by the undisputed evidence that two negroes served upon each of two Grand Juries in 1945, and that the Grand Jury for the May Term, 1946, originally contained the names of two Negroes who were excused from serving. The method which has produced a variable pattern since 1944 is clearly not the same method as that which produced a uniform pattern in previous years. If a policy of limitation was followed before 1944, it was obviously discontinued in 1945 and 1946."

case.[22] When such a consideration is undertaken, we submit that this Court will see—as the Court of Appeals saw—that the tender (a) has no direct bearing whatsoever on the actual selection of the May Term, 1946 Grand Jury; (b) deals only with the use of the method of selecting grand juries from 1910 to the latter part of 1944; and (c) does not attempt to disprove the fact that the use of the method of selecting grand juries in Baltimore City changed in the latter part of 1944 and in 1945.

In all probability, the precise ruling of the Criminal Court of Baltimore City on the evidentiary points under consideration was correct. But totally apart from any technical rules of evidence, the full weight of the proffered testimony was considered by the Court of Appeals and its decision was grounded upon that consideration. Based upon the entire record in the case at bar, therefore, we submit that no reversible error has been occasioned by the treatment by the Court of Appeals of the proffered testimony of the four retired members of the Supreme Bench of Baltimore City.

In addition to the matters discussed above, Petitioner has invited this Court's attention to various other miscellaneous rulings on evidence points made by the Criminal

[22] In addition to these demonstrable facts in relation to the proffer of the testimony of the ex-judges, it may be conceded that their testimony is in the case as if it had been given from the stand. The Court of Appeals so treated the proffer, and it is to be so treated here. There is precedent in this Court in a similar case for such a course of conduct. See *Hale v. Kentucky, supra.* There, a motion, essential to the determination of the case, was omitted from the record before the State Court of Appeals. In this Court the parties agreed that the motion might be read and considered as a proper part of the record, and the Attorney General of Kentucky disclaimed reliance upon the omission from the original record in the State court, since the motion had actually been brought to the attention of the Court of Appeals of the State. This Court decided the case on the record as thus informally made.

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Court of Baltimore City.[23] No precise grounds are stated in Petitioner's Brief for reversing the lower court because of those rulings. The inference may be drawn, however, that the Petitioner complains because the evidence there in question related to grand juries chosen subsequent to the date when the May Term, 1946 Grand Jury was selected.

We submit that the method by which grand juries have been selected in the City of Baltimore since 1946 is in some degree probative of the fact that the use of the method in selecting grand juries in the City of Baltimore had been changed by 1945. For example, such evidence would tend to substantiate the fact that the change was real, rather than illusory—one of substance rather than of form. Being relevant, therefore, we submit that the evidence was properly admitted for whatever value it might have had.

In conclusion, we submit that the decision of the Court of Appeals of Maryland should not be reversed by this Court on technical evidentiary points unless it is clearly apparent from the record as a whole that the Petitioner has failed to receive a fair trial on his motion to quash the indictment. That Petitioner received a fair and impartial hearing is obvious, not only from the remarks made by counsel for the Petitioner himself,[24] but also from a com-

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[23] See particularly pages 28 and 29 of Petitioner's Brief.

[24] At the hearing, the trial court suggested to counsel for the Petitioner that a motion for disqualification might be filed by reason of the fact that the trial court had participated in selecting the May Term, 1946 Grand Jury. Counsel for the Petitioner stated emphatically that he did not desire to interpose such a motion. In this connection, the following interesting colloquy between the trial court and counsel for the Petitioner appears in the record (pp. 61-62):

> (The Court) Now, Mr. Boyd, I ask you whether or not you wish me to disqualify myself, having signed the very list that is involved in this case.

plete review of the record in the case at bar, both before the Criminal Court of Baltimore City and before the Court of Appeals of Maryland. For the reasons above stated, therefore, the decision of the lower court should be affirmed.

IV.

THE METHOD PRESCRIBED FOR THE SELECTION OF GRAND JURIES BY THE CHARTER AND PUBLIC LOCAL LAWS OF BALTIMORE CITY IS VALID AND CONSTITUTIONAL AND DOES NOT AFFORD GROUNDS FOR QUASHING THE INDICTMENT FOUND AGAINST THE PETITIONER.

The final point which Petitioner urges as grounds for reversal in the case at bar is to the effect that the failure of the Supreme Bench to comply with the provisions of the Charter and Public Local Laws of Baltimore City in the selection of grand juries "has been one of the factors permitting and contributing to the discrimination against Negroes".[25] In making this argument, however, the Petitioner admits that non-compliance with the Charter pro-

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(Mr. Boyd) The question having occurred to you, I think the answer could just as well. I haven't any desire to disqualify you. I am not afraid of any decision I shall get.

(The Court) I am being very particular as we take this case step by step to safeguard every right this traverser has. The man I have never seen and do not know his name, except by looking at the Indictment. Are you making any motion for the disqualification of the Court in this case?

(Mr. Boyd) I am not. The Court knows the facts better than I do. Disqualification is an action that must take place only by the Court per se. If you think you are disqualified, you have the belief for that far better than I do.

(The Court) It is not that at all. Do you have any motion to make on the subject of my disqualification? I don't mind saying very personally that I do not feel in the slightest disqualified by reason of the fact that I signed the Jury list, but if you do, I want to know it at this stage.

(Mr. Boyd) I don't believe that fact is indicative one way or another. The fact that you did is not a controlling factor.

[25] See Brief of Petitioner, page 30.

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visions would not constitute grounds for quashing the indictment returned against him.[26]

In the Court of Appeals of Maryland, the Petitioner urged as one of the grounds for quashing the indictment against him precisely the same point discussed here. After making a complete and exhaustive review of the matter, the Court of Appeals found that "the objection is without merit".

It is axiomatic that in the absence of a violation of some fundamental principle of justice, a State's determination is conclusive upon the Federal Courts as to the meaning of State law. *Herbert v. Louisiana,* 272 U. S. 312, 316, 81 L. Ed. 271, 272-273 (1926); *Gregg Dyeing Co. v. Query,* 286 U. S. 472, 479-480, 76 L. Ed. 1232, 1238 (1932); *United Gas Co. v. Texas,* 303 U. S. 123, 141-142, 82 L. Ed. 702, 716 (1938). This principle has been applied in those cases in which the contention has been advanced that Negroes have been discriminated against in the selection of grand juries. *Akins v. Texas,* 325 U. S. 398, 400 (footnote 1), 89 L. Ed. 1694, 1695 (footnote 1) (1945). Since the Court of Appeals of Maryland has ruled that the provisions of the Charter and Public Local Laws of Baltimore City and the application of those statutes by the Supreme Bench of Baltimore City

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[26] Petitioner's admission in this connection seems well founded in the light of Section 709 of the Charter and Public Local Laws of Baltimore City (1938), which provides in part as follows:

> "All the provisions of this sub-division of this Article relating to the mode of drawing and summoning jurors shall be construed as directory merely, and no indictment or presentment for any felony or misdemeanor shall be quashed, nor shall any judgment upon any indictment or presentment, whether after verdict, by confession or otherwise, be stayed or reversed, nor shall any challenge to the array of jurors be allowed because of any failure by the Judges, or the clerks, or the Sheriff, to comply with the provisions of law relating to the drawing of jurors in the City of Baltimore; * * *."

are valid as a matter of Maryland Law, we submit that this decision is binding upon this Court.

The only remaining question is whether the Charter and Public Local Laws of Baltimore City, standing alone, violate some fundamental principle of justice. We concede that these statutes present an opportunity for racial discrimination in the formation of grand juries, since these juries must be "selected" by the members of the Supreme Bench of Baltimore City. But it is well settled that this fact—and this fact alone—will not constitute grounds for quashing an indictment returned against a Negro.

The case of *Smith v. Texas,* 311 U. S. 128, 85 L. Ed. 84 (1940) is directly in point. In that case, it appeared that under Texas law, the grand jury was required to be "selected" by jury commissioners who were appointed by the court. Finding that the Texas statutory scheme, standing alone, presented no grounds for quashing the indictment returned against a Negro, this Court said at page 130:

> "Here, the Texas statutory scheme is not in itself unfair; it is capable of being carried out with no racial discrimination whatsoever."

Later cases decided by this Court reinforce the rationale of *Smith v. Texas, supra.* For example, in *Fay v. New York,* 332 U. S. 261, 91 L. Ed. 2043 (1947), and in *Moore v. New York,* 333 U. S. 565, 92 L. Ed. 637 (1948), this Court sustained, as constitutional, the so-called "Blue Ribbon Jury System" which obtains in the State of New York. In the *Moore* case, *supra,* it affirmatively appeared that 150 names were drawn for a jury panel under the supervision of a Justice of the State Supreme Court, and that no Negroes were placed upon that panel. Finding nothing in the background facts which discredited the testimony that there was no practice or intent of discriminating against Ne-

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groes, this Court sustained the method of selecting the jury against a contention that the jury was the product of racial discrimination.

It thus appears that the contention of the Petitioner relative to the provisions of the Charter and Public Local Laws of Baltimore City, when reduced to its lowest terms, amounts merely to the point that these statutory provisions afford an opportunity for discrimination against Negroes in drawing a grand jury. This contention, as stated above, has been rejected by this Court. We submit, therefore, that the mere fact that the Charter and Public Local Laws of Baltimore City afford an opportunity to discriminate against Negroes in the drawing of a grand jury, does not present grounds for reversing the decision of the Court of Appeals of Maryland.

CONCLUSION

The findings of fact and the conclusions of law made so thoroughly and conscientiously by the trial court and by the Court of Appeals of Maryland are amply supported by substantial evidence in the record of the present case and by the decisions of this Court in past cases, and should, for the reasons set forth in this Brief, be affirmed.

Respectfully submitted,

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